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11 UNITED STATES DISTRICT COURT  
12  
13 DISTRICT OF NEVADA

14 JOHN DOE, individually and, on behalf of a  
15 class of those similarly situated

Case No.

16 Plaintiff,

17 v.

18 ELKO COUNTY, MARK TORVINEN,  
19 in his official capacity as District Attorney  
20 for Elko County

21 Defendants.

22 COMPLAINT FOR NOMINAL  
23 DAMAGES AND CLASS ACTION  
24 COMPLAINT FOR DECLARATORY AND  
25 INJUNCTIVE RELIEF

26 COMPLAINT

27 1. John Doe had a consensual sexual relationship with another male teenager at a  
28 time when Doe was seventeen and the second teenager was sixteen. If either Doe or the other  
teenager had been a girl instead of a boy, their sexual relationship would have been completely  
legal under Nevada law. But because the two teenagers were both boys, Elko County prosecuted  
John Doe in juvenile court for “incit[ing], entic[ing], or solicit[ing] a minor to engage in acts  
which constitute the infamous crime against nature.” N.R.S. § 201.195.

29 2. The “crimes against nature” statute creates a double standard that treats identical  
30 conduct differently based solely on whether the sexual activity involves two persons of the same  
31 sex. Under Nevada law, sixteen is the legal age of consent to engage in “ordinary sexual  
32 intercourse, anal intercourse, cunnilingus or fellatio.” N.R.S. § 200.364. The statute setting the

1 age of consent, N.R.S. § 200.364, makes no distinctions between heterosexual or homosexual  
2 activities. But a separate statute that criminalizes solicitation of a minor to engage in “crimes  
3 against nature,” singles out the identical conduct for severe criminal penalties when it involves  
4 two “persons of the same sex.” N.R.S. § 201.195.2. The “crimes against nature” statute thus  
5 enables prosecutors to circumvent the age of consent established by N.R.S. § 200.364 and  
6 prosecute identical conduct under N.R.S. § 201.195 if, and only if, the sexual conduct involved a  
7 same-sex couple.

9  
10 3. Although the charges against Doe for violating N.R.S. § 201.195 have now been  
11 dropped, Doe continues to face a realistic threat of prosecution as a result of Elko County’s  
12 policy, custom, and practice of enforcing the unconstitutional “crimes against nature” statute.  
13 While he is in Elko County, Doe is free under Nevada law to form intimate relationships and  
14 engage in consensual sexual activity with partners who are sixteen or older as long as those  
15 partners are female. If, however, Doe seeks to form an intimate relationship and engage in  
16 consensual sexual activity in Elko County with a male partner who is sixteen or seventeen years  
17 old, he faces a realistic threat of prosecution for “incit[ing], entic[ing], or solicit[ing] a minor to  
18 engage in acts which constitute the infamous crime against nature.” N.R.S. § 201.195.1. Even  
19 if no sexual activity actually occurs, Doe faces punishment for committing a gross misdemeanor  
20 if he communicates with a potential male partner who is sixteen or seventeen years old in a  
21 manner that could be construed as “incit[ing], entic[ing], or solicit[ing] a minor to engage in acts  
22 which constitute the infamous crime against nature.” N.R.S. §§ 201.195.1; 201.195.1.1(b)(1). If  
23 Doe engages in such communications on two occasions, he faces a mandatory sentence of life  
24 imprisonment with the possibility of parole after 5 years. N.R.S. § 201.195.1(b)(2). As a result  
25 of Elko County’s policy of enforcing the “crimes against nature” statute, this same threat of  
26  
27  
28

prosecution hangs over any gay person in Elko County who seeks to form an intimate relationship with a same-sex partner who satisfies the general age of consent but is under eighteen.

4. The discriminatory “crimes against nature” statute violates equal protection under any standard of review. On behalf of himself and a class of similarly situated people, Doe seeks prospective relief in the form of (a) a declaration that N.R.S. § 201.195 is unconstitutional both on its face and as applied to consensual sexual activity (and incitement, enticement, or solicitation to engage in such activity) with same-sex partners above Nevada’s general age of consent and (b) a permanent injunction prohibiting Elko County from continuing to enforce the unconstitutional “crimes against nature” statute and requiring Elko County to provide adequate training to law enforcement personnel about the statute’s unconstitutionality. Doe also seeks a declaration that Defendants violated his right to equal protection by prosecuting him under the unconstitutional “crimes against nature” statute, and nominal damages for that unconstitutional prosecution.

## PARTIES

5. Plaintiff John Doe is a resident of Washoe County, Nevada. He was born in April 1994.

6. In conjunction with this Complaint, Doe has filed a motion seeking leave to proceed under use of a pseudonym.

7. From 2007 through 2012, Doe resided in Elko County, Nevada.

8. Doe's immediate family and several of Doe's friends still reside in Elko County. Doe continues to visit friends and family in Elko County approximately once every one or two months.

9. Defendant Elko County is a political subdivision of the State of Nevada.

10. Defendant Mark Torvinen is District Attorney for Elko County with final policymaking authority for Elko County pursuant to N.R.S. §§. 252.080 and 252.110.

## **JURISDICTION AND VENUE**

11. This Court has federal-question jurisdiction over Plaintiff's claims arising under the First and Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is therefore proper under 28 U.S.C. § 1331 (general federal question jurisdiction) and § 1343 (civil rights actions). This Court has jurisdiction to render the declaratory relief requested under 28 U.S.C. §§ 2201 and 2202.

12. Venue is proper in this district under 28 U.S.C. § 1391 because Defendant resides in this district and the action arose in this district.

## FACTUAL ALLEGATIONS

## **Nevada’s “Crimes Against Nature” Statute**

13. Under Nevada law, the legal age of consent is sixteen. *See N.R.S. § 200.364.* Heterosexuals aged sixteen and above may consent to engage in consensual sexual activity – including fellatio, cunnilingus, and anal intercourse. However, same-sex partners engaging in identical conduct involving a sixteen or seventeen year old face criminal charges under N.R.S. § 201.195's prohibition of the "solicitation of [a] minor" to engage in "the infamous crime against nature."

14. N.R.S. § 201.195 prohibits “incit[ing], entic[ing] or solicit[ing] a minor to engage in acts which constitute the infamous crime against nature.” N.R.S. § 201.195.1. The statute defines “the infamous crime against nature” as “anal intercourse, cunnilingus or fellatio between natural persons *of the same sex.*” N.R.S. § 201.195.2 (emphasis added).

1       15. Even if no “crime against nature” actually occurs, N.R.S. § 201.195 punishes a  
2 single act of inciting, enticing, or soliciting a minor to engage in such conduct as a gross  
3 misdemeanor. N.R.S. § 201.195.1(b)(1). A second act of inciting, enticing, or soliciting a minor  
4 to engage in such conduct is punished as a “category A” felony with a mandatory sentence of  
5 “imprisonment in the state prison for life with the possibility of parole, with eligibility for parole  
6 beginning when a minimum of 5 years has been served.” N.R.S. § 201.195.1(b)(2).

7       16. If a “crime against nature” does occur, and the minor is fourteen years old or  
8 older, N.R.S. § 201.195 imposes the same penalty that applies to a second act of solicitation:  
9 “imprisonment in the state prison for life with the possibility of parole, with eligibility for parole  
10 beginning when a minimum of 5 years has been served.” N.R.S. § 201.195.1(a)(2). If a “crime  
11 against nature” occurs and the minor is under fourteen years old, then the mandatory minimum  
12 sentence before parole is increased to ten years. N.R.S. § 201.195.1(a)(1).

13       17. Other, generally applicable, Nevada statutes protect against sexual contact  
14 between adults and children or teenagers younger than sixteen regardless of whether the  
15 defendant is the same sex as the child.

16       18. Any “lewd or lascivious act” with a child below the age of fourteen – regardless  
17 of whether the victim and defendant are the same sex or different sex – is a “category A” felony  
18 that is “punished by imprisonment in the state prison for life with the possibility of parole, with  
19 eligibility for parole beginning when a minimum of 10 years has been served, and may be further  
20 punished by a fine of not more than \$10,000.” N.R.S. § 201.230.2.

21       19. Consensual sex with a teenager between the ages of fourteen and sixteen –  
22 including “[o]rdinary sexual intercourse, anal intercourse, cunnilingus or fellatio” – is legal if the  
23 other person is under eighteen, *see* N.R.S. § 200.364.5(a): but this is punished as a gross  
24

1 misdemeanor if the other person is between the ages of eighteen and twenty-one, *see* N.R.S. §  
 2 200.368.2; and punished as a “category C” felony with a minimum sentence of one year in prison  
 3 and a maximum sentence of five years in prison if the other person is twenty-one years old or  
 4 older, *see* N.R.S. § 200.368.1; N.R.S. § 193.130.2(c).

5 20. The following chart summarizes the different penalties that apply to “anal  
 6 intercourse, cunnilingus or fellatio” depending on whether the participants are members of the  
 7 same sex.

	Age of Consent Statute N.R.S. § 200.364	Crimes Against Nature Statute Same Sex Partners N.R.S. §201.195
Sex with a child younger than 14	Life imprisonment with possibility of parole after 10 years	Life imprisonment with possibility of parole after 10 years
Sex between 2 teenagers who are 14, 15, 16, or 17.	Not a crime	Life imprisonment with possibility of parole after 5 years (if juvenile is tried as an adult)
Sex involving a teenager who is 14 or 15 and an adult who is 18, 19, or 20	Gross misdemeanor	Life imprisonment with possibility of parole after 5 years
Sex involving a teenager who is 14 or 15 and an adult over the age of 21	Prison sentence of 1-5 years	Life imprisonment with possibility of parole after 5 years
Sex between a 16-year-old and a person over 18	Not a crime	Life imprisonment with possibility of parole after 5 years

### 25 **Prosecution of John Doe**

26 21. In February 2012, Detective Kevin McKinney of the Elko County Sheriff’s  
 27 Department began investigating alleged “inappropriate sexual acts” between Doe and another  
 28

1 male teenager, Minor One. The alleged conduct occurred two years earlier, in 2010, at a time  
2 when Doe was sixteen and Minor One was fourteen.

3 22. As part of that investigation, Detective McKinney learned that Doe had a  
4 consensual sexual relationship in 2011 with a second male teenager, Minor Two, when Doe was  
5 seventeen and Minor Two was sixteen. Attached as Exhibit A is a redacted copy of the report  
6 completed by Detective McKinney after interviewing Minor Two, in which he notes that Minor  
7 Two repeatedly told him that the sexual relationship was consensual.

8 23. On March 19, 2012, Defendant Mark Torvinen, acting in his official capacity as  
9 Elko County District Attorney, personally drafted and signed a juvenile delinquency petition  
10 filed in the Juvenile Division of the Fourth Judicial District Court of the State of Nevada in and  
11 for the County of Elko charging Doe with committing delinquent acts with Minor One and  
12 Minor Two, in purported violation of Nevada's criminal statutes. A redacted copy of the  
13 delinquency petition is attached as Exhibit B.<sup>1</sup>

14 24. By personally drafting and signing the delinquency petition filed against Doe,  
15 District Attorney Torvinen departed from his usual practice of delegating juvenile delinquency  
16 petitions to a Deputy District Attorney.

17 25. Count 11 alleged that Doe violated N.R.S. § 201.195 by engaging in consensual  
18 oral sex with Minor Two. The delinquency petition alleged: "The Child [i.e. Doe], who is the  
19 same gender as Minor Two, solicited Minor Two to allow him (said Child) to perform an act of  
20 fellatio upon the said Minor Two, which Minor Two allowed said Child to do (see NRS [§]  
21 201.195.1[a])."

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24  
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27  
28 <sup>1</sup> References to the charges related to Minor One have been redacted. Although many of the counts related to Minor One were legally flawed and, in some instances, unconstitutional, those counts are not the subject of this lawsuit.

- 1 a. The petition included a declaration from Detective McKinney alleging the
- 2 following conduct between Doe and Minor Two:
- 3 b. “That during the summer of 2011, both [Doe] and Minor Two participated
- 4 in a school function which involved camping in Lamoille Canyon”;
- 5 c. “That during that function [Doe] tent-camped with Minor Two in Lamoille
- 6 Canyon during the school function”;
- 7 d. “That one evening during this function, [Doe] in the tent in which he and
- 8 Minor Two were occupying during this school function performed fellatio
- 9 upon the penis of Minor Two.”
- 10
- 11

12 The declaration did not include any other allegations regarding the conduct between Doe  
13 and Minor Two.

14 26. On November 5, 2012, pursuant to an oral plea agreement, Elko County filed an  
15 amended petition charging Doe with a single count of “disorderly conduct” based solely on  
16 allegations concerning Minor One. A redacted copy of the amended petition is attached at  
17 Exhibit C.

18 27. Unlike the original petition, which was personally signed by District Attorney  
19 Torvinen, the amended petition was signed by a Deputy District Attorney.

20 28. The amended petition alleged: “That the child above-named did maliciously and  
21 willfully disturb the peace and quiet of a neighborhood and/or a person described as follows:  
22 Minor One, by making statements and sending messages to annoy Minor One, by lying about  
23 his personal circumstances, and by threatening to commit suicide.” The amended petition did  
24 not include any allegations based on Doe’s interactions with Minor Two.

1       29.     On December 12, 2012, Doe pled no contest to this single charge in the amended  
2 petition and was sentenced to community service. A copy of Doe's disposition order is attached  
3 as Exhibit D.  
4

5           **Threat of Future Prosecution**

6       30.     Through a final policymaker, District Attorney Torvinen, Elko County has  
7 established a policy, custom, or practice of enforcing N.R.S. § 201.195.

8       31.     Doe, who is now eighteen-years old, is a gay man who seeks to engage in  
9 consensual intimate relationships with partners who are above the age of consent under Nevada  
10 law.  
11

12       32.     Doe has friends and family in Elko County and visits Elko County approximately  
13 once every one or two months.

14       33.     While he is in Elko County, Doe is free under Nevada law to form intimate  
15 relationships and engage in consensual sexual activity in Elko County with partners who are  
16 sixteen years old or older – as long as those partners are female.  
17

18       34.     If, however, Doe seeks to form an intimate relationship and engage in consensual  
19 sexual activity in Elko County with a male partner who is sixteen or seventeen years old, he  
20 faces a realistic threat of prosecution for “incit[ing], entic[ing], or solicit[ing] a minor to engage  
21 in acts which constitute the infamous crime against nature.” N.R.S. § 201.195 .1.  
22

23       35.     If Doe engages in consensual sexual activity with a male partner in Elko County  
24 who is sixteen or seventeen, he faces a mandatory sentence of life imprisonment with the  
25 possibility of parole after five years.  
26

27       36.     Even if no sexual activity actually occurs, Doe faces punishment for committing a  
28 gross misdemeanor if he communicates with a potential male partner in Elko County who is

1 sixteen or seventeen in a manner that could be construed as “incit[ing], entic[ing], or solicit[ing]  
2 a minor to engage in acts which constitute the infamous crime against nature.” N.R.S. §§  
3 201.195.1; 201.195.1.1(b)(1) If Doe engages in such communications on two occasions, he  
4 faces a mandatory sentence of life imprisonment with the possibility of parole after 5 years.  
5 N.R.S. § 201.195.1(b)(2).

6

7 **Class Action Allegations**

8 37. Plaintiff is a member of a proposed class of people who wish to engage in  
9 consensual sexual activity in Elko County with same-sex partners who are above Nevada’s legal  
10 age of consent but under eighteen.

11 38. Elko County has a policy and practice of enforcing N.R.S. § 201.195 to  
12 criminalize intimate sexual conduct between members of the same sex even when the identical  
13 sexual conduct would be legal if engaged in by heterosexual couples.

14 39. There are questions of law and fact that are common to the Class, including, but  
15 not limited to, whether N.R.S. § 201.195 is unconstitutional on its face and as applied to the  
16 Class because it treats identical sexual conduct differently based on whether the couple  
17 engaging in the conduct are members of the same sex.

18 40. Plaintiff’s claim that N.R.S. § 201.195 is unconstitutional on its face and as  
19 applied to him is typical of the claims of the Class.

20 41. As someone who has suffered past injury and faces a realistic threat of  
21 prosecution in the future as a result of Defendant’s policy and practice of enforcing N.R.S. §  
22 201.195, Plaintiff will fairly and adequately protect the interests of the Class.

23 42. Defendant’s policy and practice of enforcing N.R.S. § 201.195 causes Defendant  
24 and its employees and agents to act on grounds generally applicable to the Class, thereby  
25

1 making it appropriate for this Court to grant injunctive relief and any corresponding declaratory  
2 relief to the Class as a whole pursuant to Federal Rule of Civil Procedure 23(b)(2).  
3

4 **CLAIMS FOR RELIEF**

5 **FIRST CAUSE OF ACTION**

6 Civil Action for Damages and Declaratory Relief  
7 Pursuant to 42 U.S.C. § 1983  
8 (On behalf of Doe)

9 43. Plaintiff reincorporates the allegations of paragraphs 1-43 as this paragraph 44.

10 44. N.R.S. § 201.195 criminalizes intimate sexual conduct based on whether the  
11 people engaging in the conduct are members of the same sex.

12 45. On March 19, 2012, Defendant Mark Torvinen, acting in his official capacity as  
13 Elko County District Attorney, personally drafted and signed a juvenile delinquency petition  
14 filed in the Juvenile Division of the Fourth Judicial District Court of the State of Nevada in and  
15 for the County of Elko charging Doe with violating N.R.S. § 201.195.

16 46. The juvenile petition alleged that Doe violated N.R.S. § 201.195 by engaging in  
17 oral sex with a member of the same sex at a time when Doe was seventeen and the other  
18 teenager was sixteen.

19 47. If Doe had engaged in identical conduct with a member of a different sex, then his  
20 conduct could not have been a crime under N.R.S. § 201.195 or any other statute.

21 48. Because District Attorney Torvinen has final policymaking authority for Elko  
22 County, his decision to file charges against Doe for violating N.R.S. § 201.195 constitutes a  
23 policy, custom, or practice of the municipality.

24 49. N.R.S. § 201.195 is unconstitutional as applied to the consensual sexual activities  
25 between Doe and Minor Two.

1       50.    N.R.S. § 201.195 is also facially unconstitutional in all its applications because it  
2 classifies and imposes disparate treatment based on sex and sexual orientation in violation of the  
3 Equal Protection Clause of the Fourteenth Amendment.  
4

5       51.    By charging him with violating N.R.S. § 201.195, Defendants violated Doe's  
6 right to equal protection under the Fourteenth Amendment.  
7

## **SECOND CAUSE OF ACTION**

8           Civil Action for Declaratory and Injunctive Relief  
9           Pursuant to 42 U.S.C. § 1983  
10           (On behalf of Doe and the Class)

11       52.    Plaintiff reincorporates the allegations of paragraphs 1-51 as this paragraph 52.  
12

13       53.    N.R.S. § 201.195 criminalizes intimate sexual conduct based on whether the  
14 people engaging in the conduct are members of the same sex.  
15

16       54.    Plaintiff and the Class seek to engage in intimate sexual conduct with members of  
17 the same sex that would be legal under Nevada's age of consent but is criminalized by N.R.S. §  
18 201.195.  
19

20       55.    Elko County has a policy, custom, or practice of enforcing N.R.S. § 201.195.  
21

22       56.    Because of Elko County's policy, custom, or practice of enforcing N.R.S. §  
23 201.195, Doe and other people who wish to engage in consensual sexual activity in Elko  
24 County with members of the same sex who are above the age of consent but under the age of  
25 eighteen face a realistic threat of being arrested, charged, and prosecuted for violating N.R.S. §  
26 201.195.  
27

28       57.    As a result of Elko County's policy, custom, and practice of enforcing N.R.S. §  
201.195, Plaintiff and members of the Class face a realistic threat of arrest and prosecution  
whenever they engage in consensual sexual activity in Elko County with members of the same  
sex who are above the legal age of consent in Nevada but under the age of eighteen.  
29

58. N.R.S. § 201.195 also imposes a discriminatory speech restriction. As a result of Elko County's policy and practice of enforcing N.R.S. § 201.195, Plaintiff and the Class face a realistic threat of arrest and prosecution if they engage in communications in Elko County with members of the same sex who are above the legal age of consent in Nevada but under the age of eighteen whenever those communications could be construed as solicitation to engage in consensual same-sex sexual activity.

59. As a result of Elko County's policy and practice of enforcing N.R.S. § 201.195, plaintiff and the Class are unconstitutionally chilled in Elko County from dating and forming intimate relationships with members of the same sex even though similarly situated heterosexual couples are free to form intimate relationships without any threat of prosecution.

60. N.R.S. § 201.195 is unconstitutional as applied to plaintiff and the Class

61. N.R.S. § 201.195 is also facially unconstitutional in all its applications because it classifies and imposes disparate treatment based on sex and sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment.

62. By imposing a realistic threat of prosecution on Plaintiff and the Class, Defendants are violating the Plaintiff and the Class's rights to free speech and equal protection under the First and Fourteenth Amendments.

## PRAYER FOR RELIEF

**WHEREFORE**, for the reasons stated above, Plaintiff and the Class request that the Court enter judgment in their favor, and against the District, for full relief, including the following:

A. Nominal damages to Plaintiff in the amount of \$1.00.

1       B.     A declaration that N.R.S. § 201.195 is invalid in all its applications and as applied  
2       to Plaintiff and the Class.

3       C.     A permanent injunction and other equitable relief:

4

5           a. Prohibiting District Attorney Torvinen, Elko County, and all of its  
6           employees and agents from enforcing N.R.S. § 201.195; and

7           b. Requiring Elko County to institute training and instruction to ensure that  
8           employees of the Elko County Sheriff's Department, Elko County District  
9           Attorney's Office, and any other Elko County law enforcement personnel  
10           understand that N.R.S. § 201.195 is unconstitutional;

11       D.     Plaintiff's costs and attorneys' fees herein pursuant to 42 U.S.C. § 1988; and

12       E.     Such other relief as the Court deems just and appropriate under the circumstances.

15       Dated: April 2, 2013

Respectfully Submitted,

16           /s/ Staci Pratt

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25       \* Application for admission  
26       *pro hac vice* to follow